



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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AUG 21 2017

RE: MUR 6924

Dear Messrs. Elias and Berkon and Ms. Jacobs.:

On March 17, 2015, the Federal Election Commission notified your clients of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On May 4, 15, and 18, 2015, the Commission received your responses. On June 9, 2015, the Commission received additional information from the complainant pertaining to the allegations in the complaint. On July 30, 2015, the Commission received your supplemental response. On August 17, 2017, the Commission found, on the basis of the information in the complaint, there is no reason to believe Andrew Winer, Pacific Resource Partnership, John White, as treasurer, and Friends of Mazie Hirono, Carol Puetto as treasurer, violated 52 U.S.C. §§ 30116 or 30118. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016), effective September 1, 2016. The Factual and Legal Analyses, which explains the Commission's findings, are enclosed for your information.

If you have any questions, please contact me at (202) 694-1650.

Sincerely,


Mark D. Shonkwiler
Assistant General Counsel

Enclosures
Factual and Legal Analyses

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

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5 MUR: 6924

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7 RESPONDENTS: Andrew Winer

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9 Pacific Resource Partnership and John White¹ in his official capacity as
10 treasurer

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12 Friends of Mazie Hirono and Carol Puetto in her official capacity as
13 treasurer

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15 **I. INTRODUCTION**

16 This matter involves an allegation that Pacific Resource Partnership and John White in
17 his capacity as treasurer ("PRP State PAC"), a Hawaii state political committee, coordinated a
18 2012 independent expenditure campaign with the Democratic Party of Hawaii ("the State Party")
19 and Friends of Mazie Hirono and Carol Puetto in her capacity as treasurer ("Hirono
20 Committee"), the principal campaign committee for U.S. Senate candidate Mazie Hirono, in
21 violation of the Federal Election Campaign Act of 1971, as amended (the "Act"). The allegation
22 is based on the fact that one individual, Andrew Winer, worked as a political consultant for PRP
23 State PAC, the State Party, and the Hirono Committee. The complaint appears to further allege
24 that the State Party violated the Act by paying Winer with nonfederal, as opposed to federal,
25 funds.²

26 As discussed below, the available evidence does not suggest that the communications in
27 question were in-kind contributions in the form of coordinated communications. Further, the

¹ The Complaint names John White individually, but the allegations appear to concern White only in his official capacity as treasurer. Compl. at 1, 5. The PRP Response was filed on behalf of PRP and White in his official capacity as treasurer. PRP Resp. at 1.

² The Commission's ongoing audit of the State Party also is examining this issue with regard to the payment of State Party employees.

record does not appear to support the allegation that the State Party improperly paid Winer with non-federal funds. Accordingly, the Commission finds no reason to believe that Winer, PRP State PAC, the State Party, and the Hirono Committee violated 52 U.S.C. §§ 30116 or 30118. The Commission also dismisses the allegation that the State Party violated 52 U.S.C. § 30125, and closes the file.

II. FACTS

During the 2012 election cycle, political consultant Andrew Winer worked on campaigns for three different political organizations in Hawaii: PRP State PAC, a non-candidate political committee organized under Hawaii state election law;³ the State Party; and the Hirono Committee.⁴ Winer was a paid consultant for PRP State PAC and “performed a variety of services,” including helping to “develop its messaging in an independent expenditure campaign” in support of Kirk Caldwell in his race for mayor of Honolulu.⁵ The strategy included a series of communications contrasting Caldwell and his opponent, including a door hanger and mailers which urged support for the “Democratic team” and featured images of Caldwell, President Obama, and Hirono (the “PRP Communications”).⁶ According to PRP State PAC, the purpose of the PRP Communications, which were distributed in October and November 2012, was to use Obama and Hirono to get frequent voters to support Caldwell in the mayoral election.⁷ PRP State PAC allocated the costs of the PRP Communications among the mentioned candidates and

³ See Compl. at 1.

⁴ Hirono Committee Resp. at 1.

⁵ PRP Resp. at 2.

⁶ *Id.* at 2, Attach. B. Despite this description of Winer’s work, PRP also states that Winer “was not paid to create or produce any public communications.” *Id.* at 2.

⁷ *Id.* at 6-7.

1 reported the federal portion, which it calculated at approximately \$122,138, as independent
2 expenditures in support of Obama and Hirono on FEC Form 5.⁸

3 In addition to his ongoing work for PRP State PAC, Winer began working for the State
4 Party as a consultant on its "Coordinated Campaign" following the August 2012 primary
5 election.⁹ In this capacity, Winer was charged with "organizing and mobilizing volunteers to
6 canvass specific neighborhoods as well as organize sign-waving events," analyzing and targeting
7 precincts "where efforts were needed to support democratic candidates," and organizing
8 "meetings on get-out-the-vote ('GOTV') strategies to encourage a strong democratic turnout for
9 the general election and to ensure the success of the democratic ticket at the polls."¹⁰ The State
10 Party states that it retained Winer as an independent consultant, not as an employee, and that it
11 allocated Winer's consulting fees according to his work on behalf of both federal and state
12 candidates.¹¹ According to the State Party, Winer's work on the Coordinated Campaign
13 benefited four federal candidates (including Hirono) and approximately 49 state candidates.¹²
14 The State Party states that it was not involved in the non-partisan Honolulu mayoral race or in
15 PRP State PAC's campaign on behalf of Caldwell.¹³

16 In addition to his consulting work for the State Party and PRP State PAC, Winer was also
17 involved in some capacity with the Hirono campaign. The complaint states that Winer was a

⁸ FEC Form 5 of PRP, January 31 Year-End Report at 2-5.

⁹ DPH Resp. at 1; *see* Winer Decl. ¶ 2.

¹⁰ DPH Resp. at 1-2; *see* Winer Decl. ¶ 2.

¹¹ DPH Resp. at 1-2.

¹² *Id.* at 1.

¹³ *Id.* at 2.

1 “senior advisor.”¹⁴ The Hirono Committee, PRP State PAC, and Winer all state that Winer was
2 not paid for his services, which focused on helping Hirono prepare for the October 16 debate,¹⁵
3 that Winer’s work for the Hirono Committee was unrelated to his work for PRP State PAC, and
4 that Winer did not have actual authority, express or implied, to engage in communications on the
5 Hirono Committee’s behalf.¹⁶

6 III. LEGAL ANALYSIS

7 A. Coordinated Communications

8 The complaint alleges that as a result of Winer’s position as a vendor of political
9 consulting services to PRP State PAC, the State Party, and the Hirono Committee, the PRP
10 Communications were coordinated communications.¹⁷ PRP State PAC and the Hirono
11 Committee each deny that there was a coordinated communication because the conduct prong of
12 the Commission’s coordinated communication regulation was not met.¹⁸ The State Party
13 generally denies the existence of any coordination between itself and PRP State PAC or the
14 Hirono Committee.¹⁹ Winer filed a response that incorporates in its entirety the PRP State PAC
15 Response and submitted a sworn declaration.²⁰

¹⁴ Compl. at 1, 4.

¹⁵ The Hirono Committee reported one disbursement to Andrew Winer during the 2012 election cycle: \$1,122.35 for “Reimb – Refreshments for event” on September 19, 2012.

¹⁶ Hirono Committee Resp. at 1-2; PRP Resp. at 3; Winer Decl. ¶¶ 7-9.

¹⁷ Compl. at 1, 4-5. The complaint also discusses a defamation lawsuit and alleged state-level reporting violations, neither of which is covered by the Act. Compl. at 2-3. The supplemental complaint, filed on June 9, 2015, suggests several potential witnesses that could aid the Commission in an investigation of this matter. It does not add any respondents or allegations. See Supp. Compl. at 1.

¹⁸ PRP Resp. at 4-7; Hirono Committee Resp. at 2-5.

¹⁹ DPH Resp. at 2.

²⁰ Winer Resp. at 1.

1 The Act prohibits corporations from making contributions, including in-kind
2 contributions, to federal candidates and their authorized committees.²¹ Correspondingly, federal
3 candidates and their authorized committees may not knowingly accept a corporate contribution.²²
4 An expenditure made by any person in cooperation, consultation, or concert, with, or at the
5 request or suggestion of, a candidate, authorized political committee, or a national or state party
6 committee constitutes an in-kind contribution.²³ Under Commission regulations, an expenditure
7 for a communication is coordinated when the communication is (1) paid for, in whole or part, by
8 a person other than the candidate, committee, or party; (2) satisfies at least one of the content
9 standards described in 11 C.F.R. § 109.21(c); and (3) satisfies at least one of the conduct
10 standards described in 11 C.F.R. § 109.21(d).²⁴

11 The first (payment) prong is satisfied here because PRP State PAC, a third party, paid for
12 the PRP Communications.²⁵ The second (content) prong is also satisfied because the PRP
13 Communications are public communications²⁶ that expressly advocate the election of three
14 individuals, two of whom (Hirono and President Obama) were federal candidates.²⁷

²¹ 52 U.S.C. § 30118(a).

²² *Id.*

²³ *Id.* § 30116(a)(7)(B)(i), (ii); *see* 11 C.F.R. §§ 109.20, 109.21(b).

²⁴ 11 C.F.R. § 109.21(a)(1)–(3).

²⁵ *Id.* § 109.21(a)(1).

²⁶ “Public communication” includes a “mass mailing,” which means a mailing of more than 500 pieces of substantially identical mail within a 30-day period. *Id.* §§ 100.26, 100.27. PRP reported \$122,138.12 in “postage and printing” for independent expenditures from October 4, 2012, through November 2, 2012. FEC Form 5 of PRP, January 31 Year-End Report at 2-5. Presumably, that amount covered more than 500 pieces of mail.

²⁷ 11 C.F.R. § 109.21(c)(3). PRP states in its response that the PRP Communications “were not intended to influence any federal election” even though they “technically advocated for a vote for the two federal candidates.” PRP Resp. at 6-7. PRP previously reported the PRP Communications to the Commission as independent expenditures. *See* FEC Form 5, 24/48 Hour Reports of PRP (October 4, 11, 24, 24, and November 12, 2012); January 31 Year-End Report of PRP at 2-5.

1 The conduct prong is not satisfied, however, because we have no information – beyond
2 the mere fact of an independent contractor relationship with Winer – indicating that the State
3 Party or the Hirono Committee was involved with the PRP Communications. Although it
4 appears that Winer was materially involved in decisions regarding the creation, production, and
5 distribution of the PRP Communications (such as the content, intended audience, and means of
6 communications),²⁸ it does not appear that Winer was acting as an agent of “a candidate,
7 authorized committee, or political party committee” with respect to the PRP Communications.²⁹
8 According to the respondents, Winer’s work for the Hirono Committee involved primarily
9 debate preparation, not communications, and was unrelated to his work for PRP State PAC.³⁰ In
10 fact, the Hirono Committee and Winer specifically deny that Winer had any authority to engage
11 in communications on the Hirono Committee’s behalf or that he shared information about the
12 Committee’s plans, projects, activities, or needs with PRP Communications.³¹ Further, the State
13 Party states that it was not involved in the non-partisan mayoral race in any capacity, a statement
14 that would appear to preclude involvement in the PRP Communications, through Winer or
15 otherwise.³² In light of the denials and Winer’s sworn declaration, absent some additional
16 evidence of Winer acting on behalf of the State Party or the Hirono Committee with respect to

²⁸ PRP Resp. at 2.

²⁹ *Id.* § 109.21(d)(2). Likewise, the available information does not show that the PRP Communications were created, produced, or distributed at the “request or suggestion” of the State Party or the Hirono Committee, after one or more “substantial discussions” about the communication between PRP and the Hirono Committee or the State Party (through Winer or otherwise), or that Winer conveyed information about the Hirono Committee’s or the State Party’s plans, projects, activities, or needs that was material to the creation of the PRP Communications, such that either the “common vendor” or “former employee or independent contractor” standards were met. *Id.* §§ 109.21(d)(1), (d)(3), (d)(4)(iii), (d)(5)(ii).

³⁰ Hirono Committee Resp. at 1-2; PRP Resp. at 3; Winer Decl. ¶¶ 7-9.

³¹ Hirono Committee Resp. at 1-2; Winer Decl. ¶¶ 7-9.

³² DPH Resp. at 2.

1 the PRP Communications, or conveying information about their plans, project, activities, or
2 needs that was material to the PRP Communications, the fact that each of the State Party, the
3 Hirono Committee, and PRP State PAC hired Winer as a consultant does not, alone, support a
4 reason to believe finding in this case.³³

5 Accordingly, the Commission finds no reason to believe that Winer, PRP State PAC, the
6 State Party, and the Hirono Committee violated 52 U.S.C. §§ 30116 or 30118 by making or
7 receiving an in-kind contribution in the form of a coordinated communication.

8 **B. State Party's Payments to Winer**

9 The Complaint also appears to allege that the State Party violated the Act because it paid
10 Winer \$17,000 from state funds and \$1,000 from federal funds for work it asserts was focused
11 primarily on the federal Hirono campaign.³⁴ The State Party states that "based on its
12 understanding of Winer's activity as an independent consultant, the Party's allocation of the
13 consultant fees to Winer was proper."³⁵

14 Under the Act, amounts disbursed for federal election activity by a state committee of a
15 political party shall be made from funds subject to the limitations, prohibitions, and reporting
16 requirements of the Act — federal funds or a mixture of federal and Levin funds.³⁶ The Act and
17 Commission regulations identify four types of federal election activity: (1) voter registration
18 activity during the period 120 days before a federal election; (2) voter identification, get-out-the-
19 vote activity, or generic campaign activity conducted in connection with an election in which a

³³ See MUR 6077 (Norm Coleman) ("close-knit web of relations" between respondents insufficient to support finding of coordination).

³⁴ *Id.* at 4.

³⁵ DPH Resp. at 2.

³⁶ 52 U.S.C. § 30125(b)(1); 11 C.F.R. § 300.32(a)(2).

1 candidate for federal office appears on the ballot; (3) a public communication that refers to a
2 clearly identified candidate for federal office and that promotes or supports, or attacks or opposes
3 a candidate for that office, regardless of whether the communication expressly advocates; and
4 (4) services provided during any calendar month by an employee of a state, district, or local party
5 committee who spends more than 25% of his or her compensated time during that month on
6 activities in connection with a federal election.³⁷

7 The Complaint questions whether Winer spent more than 25% of his compensated time
8 for the State Party working on activities in connection with a federal election, and thus his
9 consulting fees should have been paid entirely in federal funds. Even assuming an independent
10 contractor like Winer is an "employee" for purposes of section 30125,³⁸ according to the State
11 Party, Winer's work on the Coordinated Campaign benefited four federal candidates and 49 state
12 candidates.³⁹ Allocating Winer's work proportionally among federal and state candidates would
13 mean that approximately 7.5% of his payments were in connection with a federal election —
14 well below the 25% threshold, and in relatively close alignment with the allocation of payments
15 to Winer (5.5% from federal funds). Based on the limited information contained in the
16 complaint, there does not appear to be a sufficient basis to conclude that the State Party's
17 payments to Winer were inappropriate. Accordingly, based on the available record, the
18 Commission dismisses the allegation that the State Party violated 52 U.S.C. § 30125 by paying
19 Winer with non-federal funds.

³⁷ 52 U.S.C. § 30101(20); 11 C.F.R. § 100.24.

³⁸ The legal treatment of state party independent contractors has been a point of disagreement within the Commission.

³⁹ The State Party did not provide any materials with its response in this matter to support its method of allocating Winer's payments.